United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 965

Case No. 1048: HAFIZ

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Kevin Haugh; Ms. Marsha A. Echols;

Whereas, on 18 June 1998, Naseeb Alam Hafiz, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 16 October 1998, the Applicant, after making the necessary corrections, again filed an application containing pleas which read as follows:

"**II. Pleas**

1. [That] the Applicant has been subjected to demeaning, degrading and humiliat[ing] treatment under Article 5 of the Universal Declaration of Human Rights, UN Charter, Staff Regulations and Rules.

2. That the Applicant was appointed on 16.6.1981 as a "**Watchman/Gardner/ Handyman**" which duties he performed diligently for *12 years*.

3. That the job description (JD) of the Applicant was significantly altered by the management of the UNIC [United Nations Information Centre], Islamabad, unilaterally/arbitrarily without information/consultation with the Applicant, [and that] the action was [thus] against the established procedures.

4. That the change in the JD of 'cleaning of bathrooms/toilets' was not **customarily** performed by the Applicant and [that] such a change was disadvantageous and ignominious.

5. That the accusation of '***unsatisfactory service***' resulting [in] termination of employment was not based on the facts and ***sound judgement*** and [was a] violation of the terms of employment. The Applicant was ***not accustomed*** to performance of jobs of cleaning bathrooms/toilets, therefore, the service cannot be termed as ***unsatisfactory***.

6. That the Applicant may please be reinstated on the job from the date of termination of employment and ... compensation of US$ 50,000 be paid for distress, mental and emotional torture and agony suffered."

Whereas the Respondent filed his answer on 25 June 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 June 1981, on a three-month fixed-term appointment, at the G-1A, step II level, as a Watchman/Gardener at the United Nations Information Centre (UNIC), Islamabad, Pakistan. His contract was extended for one year until 15 September 1982. On 16 September 1982, he received a probationary appointment and on 1 June 1983 a permanent one. Effective 1 October 1988, the Applicant was promoted to the G-1B, step V level, and his functional title was changed to "Handyman I", but he continued to perform the duties of Watchman/Gardener.

On 18 February 1991, the Director, UNIC, Islamabad, wrote a letter to the Applicant informing him that as a result of the decision taken at Headquarters to abolish the post of Watchman/Cleaner at the Centre effective 1 April 1991, it had been decided that beginning on that date, he would undertake the duties of cleaning of the UNIC premises in addition to his duties as Watchman/Gardener. The Applicant replied to the Director, UNIC, in a letter received on 4 April 1991 stating that "being a Muslim ... [m]y humble request to you is that this job may not be assigned to me, only the duty of watchman is assigned to me".

On 14 April 1991, the Director, UNIC, wrote to the Chief, Centres Operations Service, Department of Public Information (DPI), informing him that he had received a letter from the Applicant in which he refused to undertake the additional cleaning duties citing religious reasons, and requesting advice on how to handle the situation.

On 26 October 1993, the Director, UNIC, informed the Applicant by memorandum that, effective 1 November 1993, his functional title would change to "Cleaner/Gardener". He further advised the Applicant that he would be assigned a number of new duties, including cleaning all bathrooms and toilets.

On 30 October 1993, the Applicant complained to the Chief, Centres Operations Service, about the change in his functional title and duties. He claimed that in Pakistan and India the work of sweeping and cleaning bathrooms and toilets is not considered reputable work and is done only by low caste menials. He requested the Chief, Centres Operations Service to "save" him from "unnecessary humiliation and degradation … and … injustice" by restoring his original post of Watchman/Gardener.

On 9 November 1993, the Chief, External Relations Services, DPI, wrote to the Director UNIC, Islamabad, acknowledging new security arrangements for the Centre, i.e. the hiring of a private company to provide 24-hour security, as of 1 November 1993. He agreed with the Director, UNIC, that the watchman duties performed by the Applicant should be replaced by other functions, but reminded him that the Applicant was to be relieved of cleaning the bathrooms and toilets in response to his appeal on religious grounds. He proposed giving the Applicant additional duties such as vacuum cleaning, photocopying, mail labelling and distribution.

On 21 November 1993, the Applicant's job description was revised. His new duties included maintaining the Centre's garden, back lawn and entrance area; cleaning the main entrance and the driveway; and performing other duties assigned by the Director, UNIC.

On 1 December 1993, the Director, UNIC, wrote a memorandum to the Director, Promotion and External Relations Division, DPI, suggesting "as [a] last resort" to request DPI to take immediate and urgent disciplinary action against the Applicant who had categorically refused to perform his cleaning duties as described in his amended job description. He added that the Applicant had been given numerous verbal and written instructions to perform these duties, but to no avail. In particular, he stated that:

"…

3. [The Applicant] has been 'exempted' by the Department from cleaning the indoor of the Centre or even vacuum cleaning the office after he totally refused to do

cleaning work by falsely claiming that cleaning work is done by low caste people and Christians in Pakistan even though 50% of his previous duties as Watchman/Gardener have been reduced, due to the hiring of a professionals security company to provide 24-hour security for the Centre.

4. Since [1 November] 1993, [the Applicant] has been working only as a Gardener at the Centre. Although, as instructed, we tried to give him some office functions to perform, it became clear that [he] is incapable of handling such duties because he is illiterate, both in his mother–tongue Urdu and in English.

..."

In a memorandum dated 10 December 1993, the Chief, External Relations Service, warned the Applicant that disciplinary action might be taken against him if he continued to refuse to perform the duties that had been assigned to him.

On 13 December 1993, the Director, UNIC, sent the Chief, External Relations Service, a revised job description for the Applicant of that same date, for his consideration. Duties included vacuum cleaning the Centre's Office area, maintaining the Centre's garden, the Centre's back lawn and the entrance area, cleaning the Centre's main entrance in front of the garden and the Centre's driveway, and cleaning the Security cabin located in the Centre's entrance area. On the same date, the Applicant replied to the memorandum dated 10 December 1993 from the Chief, External Relations Service stating "I have made it very clear ... that any type of cleaning work is not my job and I would never do it. ..." On 22 December 1993, the Director, UNIC, wrote to the Chief, External Relations Service, enclosing documentation from other United Nations offices in Pakistan to the effect that they employed Muslims performing cleaning duties.

On 29 December 1993, the Chief, External Relations Service, sent the Applicant a written reprimand. He informed him that his case had been referred to the Office of Human Resources Management (OHRM) for suitable action. He warned the Applicant that continued refusal to perform tasks assigned to him could lead to disciplinary action or even termination for unsatisfactory service. He also informed him that the Administration was in receipt of documentary evidence from other United Nations offices as well as Government offices that indicated clearly that Muslim employees perform a variety of cleaning duties inside and outside their premises.

On 6 January 1994, the Chairman, United Nations Development Programme (UNDP), United Nations Population Fund Staff Association, Islamabad, submitted a certificate to the effect

that no Muslim in any of the United Nations offices cleaned toilets. He certified that these functions were being performed by low cost sweepers who were not Muslim.

On 4 February 1994, the Chief, External Relations Services, wrote to a Personnel Officer, OHRM, recommending that the Applicant's services be terminated. The Applicant was informed of this recommendation in a letter dated 16 February 1994 and advised that he had one month from the date of receipt of the letter to submit a rebuttal. The Applicant submitted a rebuttal on 10 March 1994. On 4 May 1994, a rebuttal panel was established. In its report of 30 June 1994, the Panel found that no religious justification exempted the Applicant from cleaning duties and that the Applicant did not have the aptitude or qualifications to carry out the clerical functions he had been assigned. The Panel concluded that the recommendation to terminate the Applicant's employment was justified.

On 23 March 1995, the Appointment and Promotion Board (APB) recommended to the Secretary-General that the Applicant's appointment be terminated. On 22 May 1995, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to terminate his permanent appointment for unsatisfactory service, effective 31 May 1995 pursuant to staff regulation 9.1 (a).

On 29 June 1995, the Applicant wrote to the Secretary-General seeking review of the decision to terminate his appointment.

On 18 September 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 25 February 1998. Its considerations, conclusions and recommendations read as follows:

"***Considerations***

...

39. While it was true that the Appellant was relieved of the bathroom and toilet cleaning function in 1991, in the Panel's view, that was more of a privilege granted to him than of a right vested in him. Such a privilege could not have evolved into an acquired right, no matter how long the Appellant had benefited from it. Nor could it have affected his rights as a staff member, when and if it was withdrawn.

...

Conclusions and recommendations

43. The Panel *unanimously agreed* that the Appellant had failed to substantiate his allegation that the revision of his job description violated his terms of appointment.

44. It also *unanimously agreed* that the Administration had made no binding commitment to permanently relieve the Appellant of performing any cleaning function including the bathroom and toilet cleaning, either in 1991 or in 1993.

45. It further *unanimously agreed* that the due process to which the Appellant was entitled had been respected throughout the termination proceedings.

46. The Panel *unanimously found* that the Appellant's permanent appointment had been terminated, not because he refused to clean bathrooms and toilets, but because of his refusal to clean the main entrance, the driveway and the Security cabin on the UNIC/Islamabad's premises, which formed a major part of his revised job description of 21 November 1993.

47. In light of the foregoing, the Panel *unanimously agreed* to make no recommendation in support of the appeal in its entirety."

On 4 March 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General, having examined his case in light of the Board's report, decided to take no further action in respect of his case.

On 16 October 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent unilaterally and significantly changed his job description on 26 October 1993, without any apparent reason or pressing need. The changes were arbitrary and violated the terms of his employment as well as his human rights. The Applicant's refusal to perform janitorial work, including toilet cleaning, was based on his genuine religious beliefs and on his cultural fears that performing that kind of work would disgrace him and his family.

2. The Applicant had performed all his assigned duties satisfactorily, as evidenced by the very good ratings on his performance evaluation reports. Consequently, his refusal to clean toilets should not have been termed as "unsatisfactory service" for purposes of the termination of his employment.

Whereas the Respondent's principal contentions are:

1. The change in the Applicant's functions and job description was not arbitrary, and was required by the changing needs of the Office, and did not violate his rights.

2. The Applicant's permanent appointment was properly terminated in accordance with the Staff Rules and Regulations due to unsatisfactory service in full compliance with his procedural rights.

The Tribunal, having deliberated from 14 July to 3 August 2000, now pronounces the following judgement:

I. The Applicant asks the Tribunal to reinstate him and to award him US$50,000 in damages in consequence of the circumstances surrounding his dismissal from employment with UNIC in Islamabad. Those circumstances include several changes in the title of his position and in his duties. As a result of the changes in his duties the Applicant asked to be excused from performing certain tasks that he believed to be contrary to his practice of Islam and to his standing in the local society. Initially the Respondent accommodated the religious concerns of the Applicant. However, eventually they were at odds regarding the appropriate balance between the need of the Agency to conduct its affairs under changing conditions and the rights of the Applicant. The refusal of the Applicant to perform certain duties resulted in the termination of the Applicant for unsatisfactory service, in particular the Applicant's refusal to perform the revised cleaning duties associated with a changed job description.

II. The Applicant claims that he should not be required to perform those duties on religious and social grounds. The Respondent refutes those arguments and maintains its prerogative to manage the Agency as needed under changing circumstances. The Tribunal is not persuaded that a religious right of the Applicant was infringed and notes that, in its termination process, the Respondent afforded the Applicant procedural due process.

III. Staff regulation 1.2 subjects staff members to the "authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations." This broad

discretion is not without limits. The Tribunal has noted that the discretion afforded the Secretary-General may not be exercised in a "manner vitiated by prejudice or other improper motives." (Cf. Judgement No. 339, *Rau* (1984), para. XIV).

The Staff Regulations themselves contain limitations on the discretion. Staff regulation 2.1 requires the Secretary-General to classify posts and staff "according to the nature of the duties and responsibilities required". With regard to termination, the decision of the Secretary-General to terminate an employee holding a permanent appointment with the "very substantial rights" attached thereto must be reached through a "complete, fair and reasonable procedure." (Cf. Judgement No.131, *Restrepo* (1969), para. VII). This is specifically spelled out in staff regulation 9.1. In *Nelson* the Tribunal said that the "requirement of a 'complete, fair and reasonable procedure' will be adequately met if the action contemplated is subject to a fair review by a 'joint body' with staff participation". (Judgement No. 157 (1972), para. XII).

IV. The Applicant was assigned to the post of Watchman/Gardener in 1981. He was promoted in 1988, when his functional title was changed to Handyman-I but continued to perform the duties of Watchman/Gardener. In 1991 the Watchman/Gardener duties were merged with those of Watchman/Cleaner, as the latter post was abolished. As a result the Applicant was asked to perform cleaning duties in addition to his duties as Watchman/Gardener. After some discussions the Applicant was relieved of any responsibility for cleaning bathrooms and toilets on religious grounds.

Then, in 1993, the Agency hired a private security firm to provide 24-hour security, a service that had been provided at least in part by the Applicant as Watchman. The title of Watchman, which had been part of the Applicant's job title since 1981, was eliminated and "Cleaner" became the first notation in his new functional title of Cleaner/Gardener. The 26 October 1993 job description was initially informally revised, again excusing the Applicant from cleaning bathrooms and toilets. However, other cleaning responsibilities continued, including the cleaning of the main entrance, driveway and security cabin. On 21 November 1993, the Respondent adopted another job description for the Applicant that included several cleaning duties, such as cleaning the maintenance and security cabin. It did not specifically mention the cleaning of bathrooms and toilets but there was a general category "additional duties as assigned by the Director".

Beginning in 1991, the Applicant refused to perform the cleaning duties on several grounds. One issue for him was the difference between his original and new responsibilities. Another was his interpretation of his religion. A third was that "in our society in Pakistan/India the work of sweeping and cleaning bathrooms/toilets is not considered a reputable work and is done only by low caste menials ..." His refusal to clean resulted in the termination of his employment in 1995. That termination was supported by the JAB in 1998.

V. The Tribunal first must determine whether the Applicant had acquired rights regarding his position and job description, and, if so, whether they were violated. The JAB concluded that the revision of the Applicant's job descriptions did not violate his contractual terms of employment or the Staff Rules. The Tribunal notes the many changes in the responsibilities of the Applicant over the last few years. The record indicates a changing situation within the Agency, probable attempts to retain a good employee throughout the changes and attempts to accommodate the religious rights of the Applicant. It also reflects an eventual hardening of the Agency's and the Applicant's positions.

In the past the Tribunal has divided the contract of employment into those clauses that are personal to the employee and may not be revised ("contractual elements") and those revisable clauses that relate to the Agency as a whole and its functioning ("statutory elements"). In *Zap* the Tribunal held that:

> "All matters being contractual which affect the personal status of each staff member, e.g., nature of his contract, salary, grade;
>
> All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning, e.g., general rules that have no personal reference." (Judgement No. 27 (1953), para. 3).

There may be acquired rights regarding contractual elements but not statutory elements. A position title and job description are an amalgam of the two.

VI. In analyzing this claim, the Tribunal will look first at the "nature of the post and the duties assigned to it". (Judgement No. 388, *Moser* (1987), para. VIII). The Tribunal notes what could

easily be perceived as the gradual decline in the title and job description of the Applicant. However, the functional title for the position held by the Applicant was Handyman, a general category that seemed to encompass all the specific titles and job descriptions at issue. In addition, the Tribunal is persuaded that these changes were a result of the Respondent's good faith attempts to retain the Applicant in some position during a period of downsizing and change.

VII. The Applicant claims that his religion prevented him from cleaning the premises, in particular the toilets and bathrooms. The letters received by the Respondent in late 1993 from other United Nations offices in Pakistan did not support the claim that Muslims are prohibited by their religion from office cleaning. Although a 22 December 1993 memorandum from the UNIC Director mentions that Muslims do clean bathrooms and toilets in United Nations Offices in Islamabad, the record does not clearly support that conclusion and the statement from the Chairman UNDP/UNFPA Staff Association, Islamabad, refutes it.

VIII. Apparently, the Respondent initially accepted that genuine religious doctrine and beliefs could justify the Applicant's request to be excused from cleaning duties. From the record before us, the Tribunal is unable to determine the state of belief in Islam regarding this question, which was not addressed by the JAB. It was reasonable for the Respondent to conclude that at least the cleaning of the entrance and security cabin were acceptable within the tenets of Islam. The Applicant has not sustained his burden of proof on the issue.

IX. Regarding the claim by the Applicant that societal tradition and custom render cleaning demeaning, the Tribunal notes that the Respondent is not called on to make its practices accord with local customs. Instead the Respondent acted as required and without prejudice or other improper motives. Furthermore, the Tribunal does not consider requiring an employee to clean as part of his or her duties to be an inhuman or degrading treatment.

X. The Applicant also claims that there were procedural irregularities regarding his termination. The Applicant's termination was reviewed by the JAB in 1995. The Tribunal agrees with the JAB that the Applicant was accorded due process and was terminated because of his

refusal to clean the driveway and security cabin (not the toilets and bathrooms) and consequently rejects this claim.

XI For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
Vice-President, presiding

Kevin HAUGH
Member

Marsha A. ECHOLS
Member

Geneva, 3 August 2000

Maritza STRUYVENBERG
Executive Secretary